Supreme Court, U.S.
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No. 93-466

In The

Supreme Court of the United States

October Term, 1993

STERLING SUFFOLK RACECOURSE LIMITED PARTNERSHIP,

Petitioner,

v.

BURRILLVILLE RACING ASSOCIATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The First Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a private right of action must be implied in favor of 60-mile tracks under the Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001 *et seq.*, where the statute provides a remedy only for three specified categories of plaintiffs; there is no evidence of congressional intent to provide such an additional remedy; and such a cause of action would be inconsistent with the underlying purposes of the legislative scheme.

RULE 29.1 LIST

Pursuant to Rule 29.1, Rules of the Supreme Court of the United States, respondent Burrillville Racing Association, Inc., states that its parent corporation is Wembley PLC, a corporation organized under the laws of England. Shares of Wembley PLC are traded publicly. Lincoln has no subsidiaries.

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STATEMENT OF THE CASE

Petitioner Sterling Suffolk Racecourse Limited Partnership ("Sterling") seeks to create by implication a right of action in its favor under the Interstate Horseracing Act of 1978, 15 U.S.C. §§ 3001-3007 (1988) ("IHA"), despite the fact that Congress neither provided such a claim nor intended that it be available to Sterling. Recognizing that the implication of such a claim is contrary to congressional intent and would subvert the underlying purposes of the IHA, the Courts below properly rejected Sterling's request.

The IHA governs interstate off-track wagering on live horseraces through a statutorily mandated contract process which prioritizes the rights and roles of various interested parties. Interstate off-track wagering occurs when a live horserace run at a track (the "host racing association" or "host track") in one state (the "host State") is televised simultaneously to a location in another state (the "off-track" site in the "off-track State") where patrons wager on the race pursuant to the laws of the off-track State. 15 U.S.C. § 3002. Under the IHA, such wagering may be conducted "only if consent is obtained from" four entities participating in such "simulcast": the "host racing association" (the track conducting the live race), the "horsemen's group" of the host track (the group representing the "majority of owners and trainers racing" at the host track), the "host racing commission" (the agency regulating racing in the host State), and the "off-track racing commission" (the agency regulating racing in the off-track State). 15 U.S.C. § 3004(a). After completion of this process, off-track sites "shall obtain the approval" of "currently operating tracks" within sixty miles of the

off-track site[1] ("60-mile tracks").[2] 15 U.S.C. § 3004(b). The 60-mile tracks do not participate and have no proprietary interest in the interstate wagering/simulcast transactions, nor any regulatory function concerning them.

Through the IHA, Congress created a method to compel resolution of conflicts between the interests of those producing the live races, which furnish the "show" for interstate wagering, and those seeking to exploit that product at a distant site through simulcasts. Thus, the IHA first provides for a contract and consent process – contract between horsemen and host track, contract between host track and simulcast site, consent by regulatory bodies of both the host and off-track States – which assures the protection of the proprietary interests of the host entities and of the rights of each state. It is only after the IHA so harmonizes the interests of all involved in the actual components of the simulcast that the IHA provides for "approval" by 60-mile tracks, the only entity not involved in the interstate wagering transactions.

The three remaining operative sections of the IHA reflect carefully crafted and detailed relief provisions, all of which grant judicial remedies only for, and liabilities solely to, the host entities – the three specific groups

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[1] If there is no "currently operating track" within 60 miles, then the off-track site "shall obtain approval" of the "closest currently operating track in an adjoining State." 15 U.S.C. § 3004(b)(1)(B).

[2] Sterling refuses to acknowledge Congress' explicitly separate use of the words "consent" (§ 3004(a)) and "approval" (§ 3004(b)). Throughout its Petition, Sterling places itself in the "consent" group. However, the word "consent" is never used in the IHA in conjunction with 60-mile tracks.

sharing proprietary interests in the live races that are simulcast (the host track, the host horsemen's group and the host State) (15 U.S.C. § 3006) – including specific procedures for calculation and allocation of damages among these host entities. 15 U.S.C. § 3005. These parties may assert a claim against "any person" acting in violation of the IHA. 15 U.S.C. §§ 3005, 3006(a). Moreover, the IHA limits venue and jurisdiction of any enforcement actions to courts in the host or off-track States. 15 U.S.C. § 3007(b)-(c).

The facts relevant to application of the IHA are virtually without dispute.[3] Respondent Burrillville Racing Association, Inc., owns Lincoln Greyhound Park, a greyhound racing facility in Lincoln, Rhode Island ("Lincoln"). Lincoln's operations are governed by Rhode Island law and regulated by the Division of Racing and Athletics of the Rhode Island Department of Business Regulation. *See* R.I. Gen. Laws ch. 1-3.2 and 41-4. Pursuant to such authorization, Lincoln has conducted live greyhound racing for wagering purposes and, from time to time since July of 1991, has offered wagering upon simulcast races from various thoroughbred tracks. All

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[3] Petitioner incorrectly states that "[b]oth sides agree that there was no evidence anywhere in the legislative history that Congress intended to deprive 'currently operating' tracks of a remedy." (Petition, p. 4.) Respondent agrees that the legislative history does not include a specific discussion of whether or not 60-mile tracks should have a remedy, nor a specific statement that they should not. The legislative history, however, is replete with evidence that Congress intended to grant remedies only to the three entities expressly given a cause of action under the IHA and that it was fully aware of the fact that only such entities would have a remedy under the statute.

such simulcast programming and related wagering has been conducted with all consents required under Section 3004(a) of the IHA.

Sterling reopened Suffolk Downs (after approximately two years of dormancy) on January 1, 1992. Shortly before that date, Lincoln rejected Sterling's offer to approve Lincoln's preexisting simulcast programs if Lincoln agreed to simulcast Sterling races for a fee which Lincoln considered excessive. Sterling then communicated the fact of its failure to approve Lincoln's simulcast activity to host tracks which were actual or potential sources of live races for Lincoln, to the horsemen's groups operating at such tracks and to the applicable racing commissions. Sterling sought cessation of simulcast transmissions to Lincoln by those who had previously agreed to provide live racing events and refusal by other live tracks to provide simulcasts to Lincoln.

These efforts succeeded. For example, the Los Angeles Turf Club suspended its agreement to provide races from Santa Anita Race Track and Calder Race Course in Florida terminated simulcast transmissions because its horsemen's group revoked consent for participation by Lincoln. Sterling also frustrated Lincoln's efforts to obtain programming from other tracks. Unable to persuade all host entities to withhold consent for simulcast of live races to Lincoln, however, Sterling brought this action.

The district court reasoned that application of the four-part test established by this Court in *Cort v. Ash*, 422 U.S. 66, 78 (1975), precluded implication of a private right action for 60-mile tracks such as Sterling. The district

court found congressional intent to provide such a claim lacking and, in fact, that such an implied cause of action would be fundamentally inconsistent with the legislative scheme of the IHA.

The First Circuit affirmed the district court decision. The First Circuit engaged in a thorough statutory analysis which applied the decisions of this Court and examined the language, structure and purposes of the entire IHA. *See* 15a-25a.[4] Determining that "[t]he language of almost every section of the IHA, and the structure of the pivotal provisions, strongly suggest that Congress did not intend to provide disapproving 60-mile tracks with a private right of action," the First Circuit found no support for an inference of any congressional intent to create a right of action for 60-mile tracks. *See* 22a. Beyond these factors, the First Circuit concluded its analysis by reviewing the IHA's underlying purposes, recognizing that "were we to infer a right of action along the lines Suffolk delineates, we would hand 60-mile tracks an important veto power over the operation of nearby OTB offices and, in the bargain, tilt the delicate balance Congress so painstakingly constructed." 24a. In sum, "Congress's discernible intent" precluded the First Circuit "from inferring a private right of action in [Petitioner's] favor." Thus, applying the proper legal standards to the totality of the statutory scheme, the First Circuit correctly refused to rewrite the IHA.

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[4] Citations to "___a" refer to the Appendix to Sterling's Petition for Writ of Certiorari.

REASONS FOR DENYING CERTIORARI

Sterling has provided no reason or issue which merits review by this Court. The reported decisions on the issue presented here have uniformly rejected Petitioner's contentions.[5] As Petitioner concedes (Petition, p. 6), there is no circuit court conflict because the First Circuit is the only appellate court which has reviewed this issue. Petitioner's myopic contention that the First Circuit decision contravenes precedent of this Court by emphasis upon remedial omissions is belied both by this Court's decisions and by the First Circuit's thorough analysis thereunder. The decision below is correct and consistent with the decisions of this Court. Similarly, the total lack of any litigation concerning 60-mile tracks under the IHA, apart from the two actions commenced by one race track, Suffolk, deflates Sterling's characterizations of the importance of this matter.

1. The First Circuit correctly applied the appropriate analytical framework.

Sterling attempts to demonstrate misapplication by the First Circuit of well established principles of statutory construction and of tests for determining the existence of an implied right of action by mischaracterizing a selected

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[5] The three reported decisions are the two below and *New Suffolk Downs Corp. v. Rockingham Venture, Inc.*, 656 F. Supp. 1190 (D.N.H. 1987). The plaintiff in *New Suffolk Downs Corp.* was the previous owner and operator of the Suffolk Downs Race Course which is now owned by Petitioner and is the 60-mile track in this action.

portion of the First Circuit's analysis. Contrary to Petitioner's contentions, the First Circuit properly considered and applied all of the various principles relative to this inquiry as taught by *Cort v. Ash* and its progeny without any undue emphasis or inappropriate presumptions.

Petitioner does not, and cannot, dispute that the First Circuit properly focused its analysis upon a search for congressional intent (16a) nor the fact that such intent, as acknowledged by the Court below, must be inferred from review of "the language of the statute, the statutory structure or some other source." *Id.*, quoting *Karahalios v. National Fed'n of Fed. Employees*, 489 U.S. 527, 532-33 (1989); *See Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 13 (1981); *Thompson v. Thompson*, 484 U.S. 174, 179 (1988). This search should place "particular emphasis" on the statutory provisions for "enforcement and relief." *National Sea Clammers*, 453 U.S. at 13. There is no question that the First Circuit properly began by framing its analysis to employ the inquiries directed by *Cort, supra*, and the other pertinent decisions of this Court. 16a-17a.

The First Circuit proceeded to apply the mandates of this Court deliberately and expertly. After announcing affirmance of the district court decision for the reasons stated in its opinion, the First Circuit reviewed and amplified the analysis. Finding initially that 60-mile tracks were "especially benefitted" by the IHA, the First Circuit correctly recognized that such a determination does not end the inquiry and is not dispositive of congressional intent. 17a-19a. *See Universities Research Ass'n v. Coutu*, 450 U.S. 754, 771 (1981) ("the fact that an enactment is designed to benefit a particular class does not end

the inquiry; instead, it must also be asked whether the language of the statute indicates that Congress intended that it be enforced through private litigation"); *Daily Income Fund v. Fox*, 464 U.S. 523, 540-41 (1984); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 24 (1979). The First Circuit concluded that "especial benefit" status was outweighed by the "bold-faced evidence of congressional intent intricately interwoven into the IHA's language and structure." 19a.

The First Circuit found no basis in the language of the statute to support the implication of a private right of action. Assessing first the language of the enforcement, venue and jurisdictional provisions of the IHA, 15 U.S.C. §§ 3005-3007, the Court determined that both "what the IHA says and what it shies away from saying" fail to support an inference of congressional intent to provide a private right of action to 60-mile tracks. 20a-21a. Additional review of the language and structure of the "consent" and "approval" provisions of the IHA, 15 U.S.C. §§ 3004(a)-3004(b), confirmed an absence of the requisite congressional intent and the First Circuit concluded that "[t]he language of almost every section of the IHA, and the structure of the pivotal provisions, strongly suggest that Congress did not intend to provide disapproving 60-mile tracks with a private right of action against display tracks." 21a-22a.

The First Circuit then addressed the next inquiry of its statutory interpretation framework – whether the "remedy sought" is "consistent with the underlying purposes of the legislative scheme" (16a) – and concluded it was not. 22a-25a. Reviewing the objectives and purposes

of the IHA as a whole, the First Circuit recognized that to grant Petitioner the right which it sought would be to turn the IHA upside down, permitting a third-party stranger to the interstate wagering transaction to have a power not subject to regulatory review by which it could totally frustrate the IHA contractual process and the realization of the host entities' proprietary interests.[6] Thus, the First Circuit noted that "were we to infer a right of action along the lines that Suffolk delineates, we would hand 60-mile tracks an important veto power over the operation of nearby OTB offices and, in the bargain, tilt the delicate balance Congress so painstakingly constructed." 24a. In sum, the First Circuit found that the language and structure of the IHA did not evidence congressional intent necessary to imply a private cause of action for 60-mile tracks, and that such a remedy would be inconsistent with the purposes of the IHA. 19a-25a.

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[6] Under Petitioner's theory, the careful progression of horsemen/host track bargaining contract, host track/off-track contract, and state permission directed by the IHA would be wholly unprotected from the decisions, by whim or otherwise, of 60-mile tracks, the only decisions under the IHA which are neither part of a contract process nor subject to state regulatory review. Whenever it wished, a 60-mile track, whose only interest is to prevent competition, could announce disapproval of simulcast contracts and cause their termination, thus depriving the host entities of their negotiated compensation and the host and off-track States of their revenues and regulatory decision.

2. Petitioner's criticism is not compelling and inaccurately characterizes the First Circuit's analysis.

Distilled to its essence, Petitioner's criticism of the First Circuit's decision is simply an argument with the result, rather than a meaningful exposition of defects in the analysis. Petitioner's repeated assertion that the First Circuit limited its analysis to the "remedial provisions" of the IHA (*e.g.*, Petition, pp. 6, 10, 12) ignores the First Circuit's express consideration of the purposes of the IHA as a whole, "the statutory provisions dealing with 60-mile tracks" (22a-24a), the "language of almost every section of the IHA, and the structure of the pivotal provisions" (22a), including, specifically, Sections 3004(a), 3004(b) – the substantive provisions – and Sections 3005-3007 – the remedial provisions. Petitioner points to no reason why the careful consideration given by the First Circuit to the IHA remedial provisions is in any respect inconsistent with the decisions of this Court. *See National Sea Clammers*, 453 U.S. at 13 ("we look first, of course, to the statutory language, particularly to the provisions made therein for enforcement and relief").

Moreover, Petitioner's contention that the First Circuit allowed "the omission of a party from the remedial provision to control" (Petition, p. 6) is incorrect. Correctly applying the principles articulated by this Court, the First Circuit, employing no undue "presumption" concerning omission of any cause of action for 60-mile tracks from the IHA, concluded that the language actually used in the IHA, as well as what was omitted ("what the IHA says and what it shies away from saying" (21a)), failed to

furnish a basis for an inference of the requisite congressional intent.

The fact that remedies are provided by the IHA only for the three proprietary entities having consent powers under Section 3004(a) does demonstrate an absence of congressional intent to also grant 60-mile tracks a claim based upon violations of the IHA. *See Transamerica*, 444 U.S. at 20 (" '[w]hen a statute limits a thing to be done in a particular mode, it includes the negative of any other mode' "); *Russello v. United States*, 464 U.S. 16, 23 (1983) (" 'where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion' "). Such an express provision of remedies is inconsistent with any contention that Congress inadvertently omitted 60-mile tracks from the IHA enforcement provisions. *See Transamerica*, 444 U.S. at 20; *Touche Ross & Co. v. Redington*, 442 U.S. 560, 572 (1979) ("obviously, then, when Congress wished to provide a private damage remedy, it knew how to do so and did so expressly"); *T.I.M.E., Inc. v. United States*, 359 U.S. 464, 471 (1959) ("[w]e find it impossible to impute to Congress an intention to give such a right to shippers under the Motor Carrier Act when the very sections which established that right in Part I [of the Interstate Commerce Act] were wholly omitted in the Motor Carrier Act").

Petitioner's attempts to avoid these decisions by an "additional remedy" distinction (Petition, pp. 8-9) are not compelling. In none of the cases referred to by Sterling did this Court rely upon the availability of other avenues of relief for the plaintiff involved as the basis for deciding

against an implied remedy. Rather, the existence of such other avenues of relief was relied upon as *evidence* that Congress did not intend additional remedies, consistent with the maxim of *expressio unius*. *See Transamerica*, 444 U.S. at 20; *National Sea Clammers*, 453 U.S. at 15 (enforcement provisions created "inference" of congressional intent); *Massachusetts Mut. Life Ins. Co. v. Russell*, 473 U.S. 134, 146 (1985). Significantly, this Court has applied the same principles to the circumstances which Sterling claims as its own, *i.e.*, where no other remedy whatsoever was available to the plaintiff. *See T.I.M.E., Inc., supra*, (no cause of action for shipper under the Motor Carrier Act); *Touche Ross*, 442 U.S. at 574 (no implied cause of action under § 17(a), and no express cause of action under § 18(a) of the Securities Exchange Act of 1934).

Furthermore, this Court's decisions permit implication of a cause of action only when such a remedy is consistent with the underlying purposes of the statute at issue. *See Cannon v. University of Chicago*, 441 U.S. 677, 703-708 (1979). Unlike the decision upon which Petitioner relies (*Cannon, supra*), where the implied remedy sought by the potential plaintiff was not only consistent with, but necessary to, the underlying purpose of the statute, the remedy sought by Sterling is not only contrary to, but would effectively preclude, the objectives of the IHA. 22a-25a.

Sterling's effort to convert that portion of the First Circuit's opinion discussing the language of the statute in the context of its remedial provisions (19a-21a) into the

entire opinion,[7] while ignoring the remainder of the First Circuit's analysis, is transparent and unavailing. The multiple components of the First Circuit's analysis are obvious on the face of its opinion. As detailed above, *supra* at Section 1, the First Circuit, guided by this Court's decisions, carefully considered the language of both the substantive and remedial provisions of the IHA, the structure of the IHA and the inconsistency of the remedy sought with the fundamental purposes of the IHA. In its parts and in its totality, this analysis was methodically and correctly performed.

At its core, Petitioner's argument is that a private cause of action should be implied in its favor regardless of congressional intent and despite the fact (which Petitioner ignores) that such a remedy would disrupt the objectives of the statute. Petitioner, in effect, would have this Court adopt a presumption of congressional intent to provide an implied cause of action in all cases where such a remedy is omitted from the express terms of the statute. Such an approach is utterly unsupported by, and inconsistent with, the principles articulated by the decisions of this Court. *See, e.g., Thompson*, 484 U.S. at 179; *Cort, supra*. As a district court observed concerning an argument similar to Petitioner's: "[t]he fallacy of Plaintiffs' argument lies in their attempt to use the negative to prove the positive. Because a private cause of action may not exist when a statute provides a remedy does not prove that a cause of action exists when Congress does not provide a

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[7] For example, Petitioner claims that "[i]nstead of considering the statute, the court of appeals considered its remedial provisions." (Petition, p. 10.)

remedy." *Michigan Hosp. Ass'n v. Department of Social Servs.*, 738 F. Supp. 1080, 1084 (W.D. Mich. 1990). Significantly, there is no evidence in the legislative history of the IHA that Congress intended to create a remedy for any party other than the host track, the host State and the horsemen's groups.[8]

3. There are no other reasons for review.

Petitioner's views concerning the alleged "national significance" of this issue for its current purposes are belied by the paucity of litigation concerning 60-mile

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[8] The enforcement and remedy provisions of the IHA remained virtually identical throughout the 53 drafts of the legislation. Congress described its action consistently throughout the development of the IHA:

> Any person accepting an interstate wager other than in conformity with the Act will, instead, be civilly liable in a private action to the host state, the host racing association and the applicable horsemen's group in accordance with the formula that is generally intended to give these parties the amounts they would have received had the wager been placed on-track.
>
> In addition to a suit for damages, the host state, host racing association, or applicable horsemen's group may commence a civil action for injunctive relief to restrain further violations of this Act.

Report of the Senate Judiciary Committee, S.Rep. No. 1117, 95th Cong., 2d Sess. 3, 10-11 (1978), *reprinted in* 1978 U.S.C.C.A.N. 4144, 4146, 4153-54; *Report of the House Committee on Interstate and Foreign Commerce*, H.R. Rep. No. 1733, 95th Cong., 2d Sess. 3-4, 10-11 (1978); *compare Report of the House Committee on Interstate and Foreign Commerce*, H.R. Rep. No. 1366, 94th Cong., 2d Sess. 5, 10-11 (1976).

track approval rights. In fact, during the 15-year history of the IHA, the issue has been raised by only one race track – Suffolk Downs – and in only two cases, the instant litigation and that reported in *New Suffolk Downs, supra.* The controversy which led to the enactment of the IHA after two years of congressional labor was no less significant in 1978 than it is now. Nevertheless, apart from Petitioner, the public record, to date, reflects a distinct lack of concern by racetracks. These circumstances may suggest that the statutory compromise forged by the IHA struck an appropriate balance between the competing interests of live racetracks and off-track betting sites, or reflect a general recognition by 60-mile tracks of their abilities and influence with host entities (*see, supra,* at p. 4). In any event, the issues addressed by the First Circuit clearly do not rise to a level of importance which would warrant a writ of certiorari from this Court.[9]

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[9] The other decisions under the IHA involve issues wholly unrelated to the issue of a remedy for 60-mile tracks under the statute: *Retail, Wholesale and Department Store Union, Local 301 v. NLRB,* 745 F.2d 358 (6th Cir. 1984) (National Labor Relations Board's decision to continue policy of refusing to exercise jurisdiction over the horse and dog racing industries justified by Congress' failure to overrule policy in IHA); *New York Racing Ass'n, Inc. v. NLRB,* 708 F.2d 46 (2d Cir.), *cert. denied,* 464 U.S. 914 (1983) (same); *Alabama Sports Service, Inc. v. National Horsemen's Benevolent & Protective Ass'n, Inc.,* 767 F. Supp. 1573 (M.D. Fla. 1991) (suit by off-track betting system alleging illegal restraint of trade through withholding of consent of horsemen's association to simulcasting); *Atlantic City Racing Ass'n v. Attorney General of New Jersey,* 461 A.2d 178 (N.J. Super. Ct.), *aff'd,* 486 A.2d 1261 (N.J. Super. Ct. App. Div.), *rev'd on other grounds,* 489 A.2d 165 (N.J. 1985) (IHA does not preempt state legislation on parimutuel system of wagering). In addition, the United States

The IHA reflects a congressional compromise forged through lengthy and intense negotiations by many industry interest groups. As enacted, the IHA is intended "to ensure States will continue to cooperate with one another in the acceptance of legal interstate wagers" and to promote the congressional policy "to further the horseracing and legal off-track betting industries in the United States." 15 U.S.C. § 3001(a)(3), 3001(b). Petitioner's objective is to have this Court do for 60-mile tracks what Congress refused to do, and to obtain through this Court a unilateral, unrestricted veto power over the decisions and interests of state racing commissions and the tracks and horsemen's groups responsible for conducting the live races utilized for off-track wagering purposes. Contrary to Petitioner's plea, it is this result which will destroy the "balance of interests" created by the statute. (Petition, p. 15.)

Petitioner seeks to gain through this Court an implied right of which the sole purpose and function is to eliminate competition. The First Circuit methodically followed and applied the well-established legal principles of this Court to conclude that no implied right of action exists in favor of 60-mile tracks under the IHA because

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District Court for the Eastern District of Kentucky, William O. Bertelsman, Chief Judge, recently issued an unreported opinion in *Kentucky Div., Horsemen's Benevolent & Protective Ass'n, Inc., et al. v. Turfway Park Racing Ass'n, et al.*, Civil Action No. 92-199, 1993 WL 370579 (E.D. Ky. Sept. 20, 1993), holding that the IHA is unconstitutional.

there is no evidence of congressional intent supporting such an implication.

CONCLUSION

Based upon the foregoing, review by this Court is unnecessary. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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